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IBA Conference, Singapore

Sustainability and EU Competition Law

8 June 2023

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Sustainability Agreements – opportunities and risks

- Competing businesses in many sectors may wish to cooperate in order to achieve sustainability objectives.
- From competition law perspective, this entails both opportunities/merits and risks

Opportunities / merits

- Allows for optimisation of resources and know-how (and sharing of risks) between competitors in developing sustainable solutions and technology
- Can spur innovation in sustainable technologies/processes which otherwise may not happen
- Increased choice for sustainability-conscious consumers and end-users

Risks

- May lead to a reduction of competition, higher prices and/or reduction in choice for customers and end-users
- Can infringe competition law which may entail costly financial and legal consequences

The price of getting it wrong

The *AdBlue* decision

- German car manufacturers met to discuss how to meet ever-tightening emissions standards
- The manufacturers decided to use AdBlue, which reduces NOx emissions by up to 90%, with larger tanks leading to greater emissions reductions.
- The manufacturers installed AdBlue tanks that were smaller than they could have been i.e. they agreed not to do better.

Press release | 8 July 2021 | Brussels

Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars



"In today's world, polluting less is an important characteristic of any car. And this cartel aimed at restricting competition on this key competition parameter...Through this conduct, the carmakers eliminated the inherent threat that their competitor would do better. And this threat is a key driver of innovation...Today's decision is an example of the Commission's determination to pursue any anti-competitive conduct in this space."

Margrethe Vestager, European Commissioner for Competition

8 July 2021 on the *AdBlue* judgement

EU Focus on Green Deal



Ursula Von Der Leyen

President of the European Commission

"The European Green Deal is our **new growth strategy** [...] We are determined to succeed for the sake of this planet and life on it [...]. By **showing the rest of the world how to be sustainable and competitive**, we can convince other countries to move with us." (December 2019)

"The European Green Deal is our **vision and roadmap** for making Europe the **first climate-neutral continent by 2050**" (September 2020)

"The **pandemic**...was the **first accelerator** if I may call it so, for our European Green Deal. The **second accelerator**...was the **Russian war of aggression** and its triggering of the **energy crisis**. But this is only the beginning, because we now see the **third accelerator** in this story. We see that **major economies are stepping up their investment in the net-zero industry** – rightly so." (February 2023)

"We are in a **climate and environmental emergency**. The European Green Deal is an **opportunity to improve the health and well-being** of our people by **transforming our economic model**. [...] We all have an important part to play and every industry and country will be part of this transformation." (December 2019)



Frans Timmermans

Vice-President of the European Commission

Definition of “sustainability” (Ch. 9 Horizontal Guidelines)

A wide concept of “sustainability”

- Designed to help EU meet **Green Deal** objectives, which aim to allow the European Commission to honour its commitment to implement **UN Sustainable Development Goals**
- “**Sustainability agreements**” include “*any horizontal cooperation agreement that **pursues a sustainability objective**, irrespective of the form of cooperation*”
- “**Sustainability objectives**” include:
 - Initiatives that address **climate change goals**, such as:
 - reduction of greenhouse gas emissions
 - reducing pollution
 - limiting use of natural resources
 - **Social and governance-related objectives**, such as:
 - Labour standards (e.g. ensuring a living income)
 - Food safety and quality (e.g. facilitating transition to nutritious food)
 - Ensuring animal welfare
 - Upholding human rights

Agreements falling outside Article 101(1)

Sustainability agreements which are unlikely to raise competition concerns

- Agreements which “do not negatively affect **parameters of competition**, such as **price, quantity, quality, choice or innovation**” are “not capable of raising competition law concerns”.
- Chapter 9.2 of the Horizontal Guidelines gives a **non-exhaustive list** of agreements, including:
 - Agreements aiming **solely to ensure compliance with sufficiently precise requirements/prohibitions in legally binding international treaties, agreements or conventions** regardless of whether they are implemented in national law or fully enforced by a signatory state.
 - Agreements which **do not concern economic activity of undertaking**, but their **internal conduct** (e.g. competing business seeking to improve their industry’s environmental reputation by agreeing to eliminate single-use plastics from their premises).
 - Agreements to set up a **database containing general information on suppliers with (un)sustainable value chains, production processes or inputs, or distributors with (un)sustainable marketing practices**, provided parties are not obliged to buy from/sell to specific suppliers/distributors.
 - Agreements relating to **organisation of industry-wide awareness campaigns**, or **campaigns to inform customers of environmental impact** of their consumption, provided they do not amount to joint advertising of specific products.

Framework of analysis - “soft safe harbour”

A “soft safe harbour” for sustainability standardisation agreements

- Where sustainability standardisation agreements **negatively affect one or more parameters of competition**, they must be assessed under Article 101(1)
- Chapter 9.3.2.4 sets out the six cumulative conditions which must be met for a sustainability standardisation agreement to be within a soft safe harbour:
 - Procedure for developing standard must be transparent, and all interested competitors must be able to participate in process leading to selection of standard.
 - Must not impose on undertakings that do not wish to participate any direct or indirect obligation to comply.
 - Binding requirements on participants to ensure compliance are permitted, but participants must remain free to apply higher sustainability standards.
 - Must not exchange commercially sensitive information that is not objectively necessary and proportionate for development, implementation, adoption or modification of the standard
 - Effective and non-discriminatory access to outcome of standard-setting process must be ensured
 - Sustainability standard must satisfy at least one of the following conditions:
 - Standard must not lead to a “significant” increase in price or reduction in quality of product in question.
 - Combined market share of the participating undertakings must not exceed 20% of any relevant market affected by the sustainability standard.

Framework of analysis - Article 101(3) exemptions

Provided they **do not eliminate competition**, sustainability agreements that are caught under Article 101(1) TFEU may still be exempt under Article 101(3) if they meet the **following three cumulative conditions**.

Efficiency Gains

- Covering sustainability benefits both in terms of **qualitative efficiencies** as well as cost-savings

Indispensability

- Agreement is necessary to **cure market failures**

Consumers receiving fair share of benefits, including:

- Individual use value benefits (e.g. improved product quality or variety)
- Individual non-use value benefits (where consumers value the **impact** of their **sustainable consumption** on others, despite **no improvement in quality** – e.g. fair trade coffee)
- Collective benefits (where a **larger group of consumers** outside the relevant market also benefit – e.g. agreements to limit fuel pollution, **provided these consumers substantially overlap with consumers within the relevant market**) e.g.
 - Drivers who buy less polluting fuel are also citizens who benefit from cleaner air – substantial overlap.
 - Consumers buying sustainable cotton which reduces use of fertilisers typically do not overlap with beneficiaries of resulting environmental benefits

Next Steps - Informal Guidance

The European Commission has expressed willingness to provide informal guidance as to the application of the new Horizontal Block Exemptions and the Horizontal Guidelines.

Revised Horizontal Guidelines Chapter 9.1 (paragraph 515)

“The Commission is committed to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements through its Informal Guidance Notice.”

Informal Guidance Notice issued 3 October 2022 (paragraphs 3 to 4)

“Undertakings are generally well placed to assess the legality of their actions [...] They are close to the facts and have at their disposal the framework of block exemption regulations, case law and existing Commission decisions as well as extensive guidance in Commission guidelines and notices, which have been provided in order to further assist self assessment by undertakings. [...] Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 101 or 102 TFEU, individual undertakings may wish to seek informal guidance from the Commission. [...] A request for guidance will not entitle an applicant to receive any such guidance. [...] However, where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such informal guidance...in a written letter.”









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Any questions?

ANNEX

Initiatives across Europe to support Green Deal objectives

Jurisdiction	Current status
European Union 	<ul style="list-style-type: none">March 2023 – Adoption of Temporary Crisis and Transition State Aid Framework (TCTF), loosening state aid rules to prevent green projects from fleeing to US in light of Inflation Reduction Act.1 June 2023 – Revised Rules on Horizontal Cooperation and Guidelines (including on sustainability agreements) adopted; new HBER to come into force 1 July 2023.
Netherlands 	<ul style="list-style-type: none">Draft Guidelines on sustainability agreements and public consultation – closed in Oct.2020Results of consultation and second Draft Guidelines published in January 2021ACM announced 1 June that it will update its Guidelines to bring them in line with EU Guidelines.
France 	<ul style="list-style-type: none">French regulators (including national competition authority) published working paper on their role in the face of climate change in May 2020:
Greece 	<ul style="list-style-type: none">Extensive discussion paper on how competition policy could contribute to a “green” transition followed by virtual conference in September 2020.In July 2021 the Hellenic Competition Commission (HCC) launched a public consultation on the merits of a ‘sustainability sandbox’ to allow businesses to evaluate green projects from the point of view of compliance with competition law. Based on positive feedback, the sandbox was implemented.
UK 	<ul style="list-style-type: none">CMA issued draft guidance on the application of the Chapter I Prohibition in the Competition Act 1998 to sustainability agreements in February 2023, and held a public consultation on them between 28 February and 11 April 2023.Results of consultation and final guidelines awaited
Germany 	<ul style="list-style-type: none">Germany is reluctant to publish guidelines because there is insufficient case law in the area to “set up guidelines on the big issues” (Andreas Mundt, Head of the Bundeskartellamt in February 2022)In May 2023, Mundt reiterated at a competition law conference in Brussels that Germany will not publish guidelines because case law is not mature enough.